

ORGANIZED SPORTSMEN OF LASSEN COUNTY

IBLA 91-75

Decided November 6, 1992

Appeal from a decision of the Susanville, California, District Manager, Bureau of Land Management, rejecting a proposal for a permit to use assault weapons on public lands. CACA 27404.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Permits--Public Lands: Special Use Permits--Special Use Permits

Under sec. 302(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(b) (1988), and the implementing regulations in 43 CFR Subpart 2920, BLM has discretion to reject a proposal for use of lands which conflicts with BLM policy for management of the public lands involved. BLM properly rejects a proposal for a permit authorizing the use of assault weapons on public lands where such rejection is based on the State Director's Instruction Memorandum No. CA-90-155 in which he establishes a policy of closing BLM lands in California to the possession of assault weapons as defined by State law.

2. Federal Land Policy and Management Act of 1976: Permits--Public Lands: Special Use Permits--Special Use Permits

Where, under the authority of the Secretary of the Interior to issue permits pursuant to sec. 302(b) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(b) (1988), and 43 CFR Subpart 2920, BLM rejects a proposal for a permit authorizing the use of assault weapons on public lands based on State Director's Instruction Memorandum No. CA-90-155 in which he establishes a policy of closing BLM land in California to the possession of assault weapons as defined by State law, one challenging that determination must provide compelling reasons for modification or reversal. Failure to do so will result in the determination being affirmed on appeal when it is supported by the record.

APPEARANCES: Renatto "Mo" Moretto, President, Organized Sportsmen of Lassen County, Susanville, California, for appellant.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Organized Sportsmen of Lassen County (OSLC) has appealed from a decision of the Susanville, California, District Manager, Bureau of Land Management (BLM), dated October 30, 1990, denying OSLC's request for permission to use assault weapons on public lands in the Susanville District. The request was filed by OSLC on July 20, 1990, seeking authorization to use "assault type" weapons on lands administered by BLM in California's Lassen and Modoc Counties. OSLC explained that "[t]here are several sportsmen, locally and Statewide, who use these type weapons for plinking, target practice, rabbit hunting, etc., and would like to continue such usage on public lands."

In his decision the District Manager noted that OSLC's request had been considered an application for a permit under section 302(b) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1732(b) (1988), and the regulations in 43 CFR Part 2920. The District Manager referred to Instruction Memorandum (IM) No. CA-90-155, dated February 13, 1990, in which the State Director, California State Office, BLM, established a policy on the possession and use of assault weapons, as defined in the Roberti-Roos Assault Weapons Control Act of 1989, on public lands. Under that policy, BLM lands in California are closed to the possession of assault weapons as defined by State law, although District Managers may designate specific areas where such weapons may be used, after consultation with the State Director and the public. The District Manager's decision explained that areas such as firing ranges may be designated for use of such weapons after consideration and review through BLM's planning system. It noted that OSLC requested permission to use assault weapons on all public land in Lassen and Modoc Counties, not in a specific area, and that the "application was filed after a discussion between the [OSLC] and Susanville District personnel, with the express intent by the Sportsmen to receive a formal, appealable response." Stating that "[t]he State Director's policy is the policy of the Susanville District," the District Manager denied permission to use assault weapons on all public land in the Susanville District in accordance with the IM. 1/

1/ In an Oct. 4, 1990, memorandum to the District Manager, the Susanville District Realty Specialist reported that OSLC's request had "been serialized as an application for a permit under Section 302(b) of [FLPMA]." He stated:

"Generally, no permit is required to use firearms on public land unless an area has been closed to weapons use because of safety reasons. * * * Use of firearms on non-closed public lands for [uses mentioned by OSLC] is considered casual use * * *. [See 43 CFR 2920.0-5(k).] However, the State of California enacted the Assault Weapons Control Act of 1989 (CPC 12276.5) which defines certain specific models of rifles, shotguns and pistols as assault weapons. These weapons may be legally possessed in California only if they are registered or permitted by the state by

In its statement of reasons OSLC asserts that the policy set forth in the IM violates a Memorandum of Understanding dated May 25, 1990, between the National Rifle Association and BLM and deteriorates, rather than improves, lawful uses of public lands. OSLC states that BLM's policy prevents legal uses of legally possessed firearms on public lands administered by BLM although there is no such policy on State-owned lands or on lands administered by other Federal agencies such as the Forest Service or the U.S. Fish and Wildlife Service. OSLC argues that although the IM notes assault weapons may be possessed under California law with the express permission of the landowner, the IM prohibits possession under these circumstances. OSLC asserts that the policy discriminates against a specific group of persons because persons who legally own and possess assault weapons may not possess them for hunting under BLM's policy while other persons may possess any other legally owned firearm for hunting. OSLC points out that persons who legally own and possess assault weapons may possess such weapons without a permit on BLM lands administered by the Susanville District within the State of Nevada, but are denied these privileges on BLM lands administered by the same district office in the State of California. According to OSLC, this discriminates against a group of persons solely on the basis of geographic location. OSLC contends that persons who legally own and possess weapons are discriminated against because they are prevented from engaging in legal recreation activities using legal recreation implements on lands of which they are co-owners and co-supporters. OSLC asserts that BLM's policy infringes on the Second Amendment constitutional right to bear arms and violates the Fourteenth Amendment equal protection clause and the Fifth Amendment due process clause. OSLC argues that the BLM policy against the use of assault weapons is arbitrary because it is a Statewide policy that was put into effect without public hearings, public input or an environmental analysis. OSLC contends that there is no valid safety reason and no resource protection reason to ban assault weapons because BLM allows, without permit, the use of weapons of similar caliber, semi-auto mode, and similar magazine capacity that are not defined as assault weapons and the use of these weapons has never been a safety problem. In sum, OSLC argues, the prohibition in BLM's IM "cannot be legally, morally, or ethically justified."

Section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1988), and its implementing regulations, 43 CFR Subpart 2920, authorize issuance of land-use permits for "[a]ny use not specifically authorized under other laws or regulations and not specifically forbidden by law." 43 CFR 2920.1-1. 43 CFR 2920.2-1(a) provides that "[a]ny person who seeks to use public

fn. 1 (continued)

January 1, 1991. A legally possessed weapon may be used on property only with the express permission of the landowners. Under state law, use of defined assault weapons may occur on public lands only with the express permission of BLM."

The Realty Specialist recited the policy established by the IM and recommended the OSLC request be denied.

lands may contact the Bureau of Land Management office having jurisdiction over the public lands in question and discuss the land use proposal."

This took place at a meeting on June 21, 1990, between the BLM District Manager and two members of OSLC who had received a copy of the IM from the State Director. In effect, the District Manager told OSLC's members he could not issue a minimum impact permit under 43 CFR 2920.2-2 2/ and encouraged them to submit a proposal for a land-use authorization in writing under 43 CFR 2920.2-3. 3/ Although OSLC's July 18, 1990, letter did not conform to all the requirements for the contents of a proposal set forth in 43 CFR 2920.2-4, e.g., it did not include a map, it was apparently adequate for BLM's review under 43 CFR 2920.2-5. BLM's October 30, 1990, decision constitutes its written explanation in accordance with 43 CFR 2920.2-5(c)(1) why the proposal "does not meet the requirements of this subpart." 4/ The requirements of 43 CFR Subpart 2920 are that the

2/ 43 CFR 2920.2-2 provides that an authorized officer

"may, without publication of a notice of realty action, issue a permit for a land use authorization upon a determination that the proposed use is in conformance with Bureau of Land Management plans, policies and programs, local zoning ordinances and any other requirements and will not cause appreciable damage or disturbance to the public lands, their resources or improvements."

3/ Although the Realty Specialist's Oct. 4, 1990, memorandum and the District Manager's Oct. 30, 1990, decision state that OSLC's request was treated as an "application for permit under section 302(b)," we think it

is properly regarded as a proposal. Under 43 CFR 2920.5, an application follows only after a notice of realty action has been published and sent to the parties of interest by the authorized officer when a determination has been made that public lands are available for a particular use. See 43 CFR 2920.4.

4/ 43 CFR 2920.2-5(c)(1) provides:

"If a proposed land use does not meet the requirements of this subpart or is found not to be in conformance with the land use plan, the authorized officer shall so advise the proponent and shall provide a written explanation of the reasons the proposed use does not meet the requirements of this subpart and/or is not in conformance with an existing land use plan."

Such BLM decisions are subject to appeal to the Interior Board of Land Appeals. The preamble to the proposed rules for 43 CFR 2920 states:

"The authority to issue permits, leases and easements will be delegated to District Managers. This delegated authority will be subject to an appeal procedure under Part 4 of Title 43 of the Code of Federal Regulations by an adversely affected party for review by the Interior Board of Land Appeals. Also subject to appeal under Part 4, is the determination of consistency, including a determination by the Interior Board of Land Appeals as to whether the Bureau followed its established procedure in finalizing the land use plan that is the basis of the consistency determination."

45 FR 31284 (May 12, 1980).

"In order to bring the language of this rulemaking in line with the terminology used in the land use planning regulations, the word 'consistency' [was] changed to 'conformance.'"

46 FR 5773 (Jan. 19, 1981).

proposed land use "conform with Bureau of Land Management plans, policy, objectives and resource management programs." 43 CFR 2920.0-6. 5/

[1] Under section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1988), BLM has discretion to reject a proposal for a proposed use of lands if it conflicts with BLM objectives, responsibilities, or programs for management of the public lands involved. See Red Rock Hounds, 123 IBLA 314, 318 (1992); Patrick G. Blumm, 121 IBLA 169, 171 (1991); American Motorcycle Association, District 37, 119 IBLA 196, 199 (1991); Southern California Trials Association, 104 IBLA 141 (1988); Cascade Motorcycle Club, 56 IBLA 134 (1981); Whitewater Expeditions & Tours, 52 IBLA 80 (1981). BLM properly rejected the proposal for a permit authorizing the use of assault weapons on public lands because such use conflicts with BLM policy for managing public lands as set forth in IM No. CA-90-155.

There is no provision in 43 CFR Subpart 2920 which permits a citizen to file an application to amend a plan to include a use that has been determined not in conformance with a policy or plan. Rather, it is within BLM's discretion under 43 CFR 2920.2-5(c)(2) whether to undertake the plan amendment procedure. 6/ However, OSLC is not entirely precluded from using assault weapons on BLM lands. Both IM No. CA-90-155 and BLM's decision of October 30, 1990, indicate that BLM district managers, after consultation with the State Office and the public, may designate specific areas where State-defined assault weapons may be utilized. 7/

5/ 43 CFR 2920.2-4 requires that a proposal is to provide the proponent's opinion "whether the proposal is * * * in conformance with Bureau of Land Management plans, programs and policies for the public lands covered by the proposal."

6/ In the preamble to the final rulemaking for 43 CFR Part 2920, BLM considered a comment which requested that this section be amended to require the authorized officer to consider a proposal that is found to not conform to an existing land-use plan as an application to amend or revise the plan rather than leaving it to the authorized officer's discretion as the proposed rulemaking did. BLM stated that this change was not adopted and offered the following explanation:

"There will be instances where the land use proponent, once the non-conformance is explained, will not want to go any further with the matter. In nearly every instance, the authorized officer will discuss whether or not the proposal should be considered a request to amend or revise an existing land use plan with the proponent before proceeding. The amendment revision process is a complicated procedure and the land use proponent may not want to spend the time and effort to complete the process. The suggested change has not been adopted."

46 FR 5773 (Jan. 19, 1981).

7/ The IM provides:

"Approving Target Ranges: District Managers shall notify the State Director * * * of any locations potentially considered suitable for assault weapon use. Public notice shall be made of proposed target ranges where assault weapons might be used through BLM news releases and posting of information in BLM offices."

[2] In reviewing BLM decisions relating to its authority to issue permits under section 302(b) of FLPMA, 43 U.S.C. § 1732(b) (1988), we have said that absent compelling reasons for modifications or reversal, a BLM determination will be affirmed if the decision is supported by the record. See Stan Rachesky, 124 IBLA 67, 70 (1992); Red Rock Hounds, Inc., *supra* at 318; American Motorcycle Association, District 37, *supra* at 199. The record in this case shows that BLM's decision is based on IM No. CA-90-155 in which the State Director established a policy to close public lands in California to the possession of assault weapons as defined by law in the State of California. This policy leaves open the possibility that such weapons may be used in specific areas. OSLC has shown no compelling reason for the modification or reversal of this decision.

Regarding OSLC's contention that its constitutional rights have been violated, it is well established that the Department of the Interior, as an agency of the executive branch of the Government, is not the proper forum to consider constitutional arguments. Joseph A. Barnes, 78 IBLA 46, 59-60, 90 I.D. 550, 558 (1983), order granting summary judgment to Government, Civ. No. 84-6008-E (D. Or. Mar. 31, 1986), *aff'd*, No. 86-3782 (9th Cir. June 9, 1987).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Will A. Irwin
Administrative Judge

I concur:

John H. Kelly
Administrative Judge